

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

KEISER V. HOHENTHANER

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION
AND MAY NOT BE CITED EXCEPT AS PROVIDED BY NEB. CT. R. APP. P. § 2-102(E).

LAURA KEISER, APPELLEE,
V.
SCOTT HOHENTHANER, APPELLANT.

Filed May 22, 2012. No. A-11-590.

Appeal from the District Court for Sarpy County: DAVID K. ARTERBURN, Judge.
Affirmed.

John J. Heieck and Matthew Stuart Higgins, of Higgins Law, for appellant.

Grant A. Forsberg, of Forsberg Law, P.C., L.L.O., for appellee.

INBODY, Chief Judge, and IRWIN and SIEVERS, Judges.

SIEVERS, Judge.

I. INTRODUCTION

Scott Hohenthanner appeals from an order of the district court for Sarpy County granting custody of the parties' minor child to Laura Keiser (Laura) and allowing her to remove the child to South Dakota. We affirm.

II. BACKGROUND

The parties, who never married, are the biological parents of one child: Tatum Hohenthanner, born in May 2004. Laura and Scott had an "on-and-off" relationship since 2000, when they met as students at the University of South Dakota at Vermillion. Laura and Tatum lived in South Dakota until June 2006, when they moved to South Sioux City, Nebraska. In August 2007, Laura and Tatum moved to Omaha, Nebraska, at Scott's request. Shortly after Laura and Tatum moved to Omaha, Laura and Scott ended their romantic relationship. Scott also has a 12-year-old daughter from a prior relationship. His older daughter lives with her mother in Council Bluffs, Iowa. Scott regularly exercises visitation with her.

On November 27, 2007, Laura filed a complaint to establish paternity and support. In her complaint, she alleged that Scott was the biological father of Tatum. She also sought temporary and permanent custody of Tatum and asked that the court order Scott to pay child support, provide health insurance, pay out-of-pocket future medical care, and pay a portion of childcare expenses.

On November 30, 2007, Laura filed a motion for temporary custody and allowances. In its order signed on December 21, the district court awarded temporary custody of Tatum to Laura, subject to Scott's parenting time which was specifically set forth in the order.

On January 25, 2008, Scott filed a "motion for leave to file answer out of time," which was granted by the district court on February 11.

On February 15, 2008, Laura filed an amended complaint to establish paternity and support. In addition to restating the allegations from her original complaint, Laura also sought the court's permission to remove Tatum from Nebraska to South Dakota.

In his answer and cross-complaint filed on February 29, 2008, Scott alleged that he was Tatum's biological father. Scott alleged that an order of joint custody would be in Tatum's best interests, but sought sole custody of Tatum if the court did not award joint custody. On May 21, 2009, Laura filed a motion to dismiss the removal action only.

The decree of paternity was filed on September 1, 2009. In the decree, the district court found that Scott is Tatum's father. The court awarded Laura and Scott joint legal and physical custody of Tatum, with Laura maintaining the primary decisionmaking authority regarding major decisions affecting Tatum's health, education, and religion; however, Laura was to consult with Scott prior to making such decisions. The parties' parenting time was specifically set forth in the decree. Scott was to have parenting time every Thursday overnight, alternating weekends, and alternating Wednesdays overnight. Scott was ordered to pay child support in the amount of \$650 per month, 60 percent of work-related childcare expenses, and 60 percent of unreimbursed medical expenses after the first \$480 per year.

Laura filed a complaint for modification on June 10, 2010. In her complaint, Laura alleged a material change in circumstances in that (1) she had received an employment opportunity in Gayville-Volin, South Dakota, and (2) she had become engaged to Adam Haberman (Adam), who resides and is employed in Yankton, South Dakota. Laura sought custody of Tatum, subject to Scott's reasonable parenting time. Laura also sought the court's permission to remove Tatum from Nebraska to South Dakota.

On July 7, 2010, Laura filed a motion for a custody evaluation by a clinical psychologist. Also on July 7, Laura filed a motion for expedited trial or, in the alternative, a motion for a temporary order allowing her to remove the minor child from the jurisdiction pending trial. On July 19, Scott filed a "verified motion" seeking immediate custody of Tatum, alleging that Tatum should remain in Nebraska pending trial.

Scott filed an answer and cross-complaint for modification on July 20, 2010. In his cross-complaint, Scott alleged a material change in circumstances in that (1) Laura recently moved to South Dakota, (2) Tatum now spends 5 hours round trip in a car twice per week so that Scott can exercise his parenting time, and (3) Laura's decision to move Tatum away from Scott was not in Tatum's best interests. Scott sought custody of Tatum and asked the court to create a parenting plan for Tatum. On July 21, Scott filed a "resistance to plaintiff's motion to remove

child from jurisdiction,” citing *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000), which discourages trial courts from granting temporary permission to remove children to another jurisdiction prior to a ruling on permanent removal.

At a motions hearing on July 26, 2010, the district court denied the temporary removal to South Dakota. The district court also sustained Laura’s motion for a custody evaluation. And Scott stated that he did not object to Dr. Kevin Cahill performing the evaluation.

On October 25, 2010, Scott filed a motion to continue the trial scheduled for October 27 and for disclosure of the opinion or report of Dr. Cahill, Laura’s expert. On October 26, Laura filed an objection to Scott’s motion to continue. Laura alleged that Scott had willfully attempted to prolong the trial. She also alleged that Scott delayed contacting Dr. Cahill’s office for more than 30 days, despite knowing that time was of the essence. Laura further alleged that she was not withholding Dr. Cahill’s opinion or report, but, rather, Dr. Cahill was still in the process of preparing such. Also on October 26, Laura filed a “motion in the alternative to trial for additional temporary relief,” asking the court, should it continue the trial, to grant a temporary modification of the parenting schedule to allow her to relocate with Tatum to Crofton, Nebraska.

The district court filed its temporary order on November 10, 2010. Because Dr. Cahill had not yet reduced his opinions to writing, the district court granted Scott’s motion to continue and trial was scheduled for December 14. The court further modified the parenting schedule to accommodate Laura’s move to Crofton with Tatum. The district court attached a parenting calendar through January 3, 2011; granted Scott two 30-minute Webcam communications per week; and liberal telephone contact. The court ordered that if a future order was not entered on or before January 3, Scott shall be entitled to “similar parenting time” as set forth in the parenting calendar through January 3.

On December 9, 2010, Laura filed a motion to continue, alleging that (1) Dr. Cahill had not submitted his report and (2) she sent a proposal to Scott in an effort to reach a settlement. The district court granted Laura’s motion and continued the trial to February 22 and 23, 2011.

On February 17, 2011, Laura again filed a motion to continue alleging that (1) Dr. Cahill had not submitted his report and (2) she sent a proposal to Scott in an effort to reach a settlement. The district court again granted Laura’s motion and continued the trial to May 5 and 6. The court also found that Dr. Cahill violated the prior order of the court requiring him to complete and submit his custody evaluation to the parties by November 15, 2010. The court ordered Dr. Cahill to complete and submit the custody evaluation report to the parties on or before March 15, 2011.

On March 22, 2011, Laura filed an amended motion for additional temporary relief. She alleged the court’s order entered on November 10, 2010, included a day-by-day parenting schedule through January 3, 2011, and that the parties have had difficulty agreeing on parenting time since January 3. Laura further alleged that she has had difficulty making the exchange time without leaving work early. Laura asked the court to set out a specific parenting schedule, modify the exchange time, and require Scott to give her 24-hour notice if he intends to pick Tatum up from school for his weekend parenting time.

On March 25, 2011, Scott filed a “verified motion to vacate order allowing temporary change of residence and for immediate custody change.” Scott requested that the district court vacate its order of November 10, 2010, that allowed Laura to “temporarily” remove Tatum to a place within Nebraska, but less than 5 miles from the Nebraska-South Dakota state line and

10 minutes from the destination to which Laura petitioned the court to permanently remove the child. Scott also asked the court to immediately award temporary custody to him. Scott alleged that Laura is attempting to “poison the child’s connections to Nebraska and bolster her removal suit.” Scott further alleged that his time with Tatum “suffered in quantity and quality.”

Trial was held on May 5 and 6, 2011. The testimony will be discussed as necessary in our analysis. The district court filed a temporary order on May 31 setting forth a specific parenting schedule for the parties extending into the summer.

The district court filed its opinion and order of modification on June 9, 2011. The district court found that a material change in circumstances had occurred because (1) Laura married Adam, who lives and works in Yankton, and (2) because of her marriage, Laura has obtained employment teaching in the Gayville-Volin school district near Yankton. The district court found that Laura had a legitimate reason for leaving Nebraska. The district court also found that because the parties have been unable to communicate and coparent Tatum effectively, it was in Tatum’s best interests to award sole legal and physical custody to Laura. The district court granted Laura permission to remove Tatum from Nebraska to Yankton. The district court set forth a specific parenting plan, which gave Scott parenting time two weekends per month during the school year, every other week during the summer, specified holidays, and certain days that Tatum was not in school. Additionally, Scott was awarded two 30-minute Webcam communications with Tatum per week and one telephone contact on days in which the Webcam conversations do not take place. Scott now appeals.

Pursuant to our authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), we have ordered this case submitted for decision without oral argument.

III. ASSIGNMENTS OF ERROR

Scott alleges that the trial court erred in (1) entering the temporary instate removal order because it violated Scott’s due process rights to reasonable notice, a meaningful opportunity to be heard, and an impartial judge; (2) refusing to apply the prohibition on temporary out-of-state removals in *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000), to the temporary instate removal in this case; (3) blocking Scott’s attempts to voir dire and cross-examine Dr. Cahill on the theory, methodology, and application of his opinions; (4) overruling Scott’s objections that Dr. Cahill’s opinions did not assist the trier of fact; (5) overruling Scott’s objections that Dr. Cahill’s theory was unreliable; (6) overruling Scott’s objections that Dr. Cahill’s methodology was unreliable; (7) overruling Scott’s objections that Dr. Cahill’s application was unreliable; (8) overruling Scott’s objections that Dr. Cahill’s report, the American Bar Association (ABA) study, and the minor child’s statements were inadmissible hearsay, and that Dr. Cahill’s testimony served as a conduit for such inadmissible hearsay; and (9) ruling that Laura should have sole custody of the child and granting permanent removal to South Dakota.

IV. STANDARD OF REVIEW

Child custody determinations, and visitation determinations, are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court’s determination will normally be affirmed absent an abuse of discretion. *Rosloniec v. Rosloniec*, 18 Neb. App. 1, 773 N.W.2d 174 (2009).

V. ANALYSIS

1. TEMPORARY REMOVAL

Scott alleges that the trial court erred in entering the temporary instate removal order because it violated Scott's due process rights. He also argues that the trial court erred in refusing to apply the prohibition on temporary out-of-state removals in *Jack v. Clinton* to the temporary instate removal in this case, although there is no authority for doing so.

Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Big John's Billiards v. State*, 283 Neb. 496, ___ N.W.2d ___ (2012). For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders. *Id.* An order is final for purposes of appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered. *StoreVisions v. Omaha Tribe of Neb.*, 281 Neb. 238, 795 N.W.2d 271 (2011).

Scott claims in his brief that the November 10, 2010, order was a final, appealable order because it affected a substantial right (his fundamental rights as a father) and was made during a special proceeding (modification relating to removal of child from the jurisdiction). Assuming without deciding that the November 10 order was a final, appealable order as Scott claims it was, we are without jurisdiction because Scott did not appeal within 30 days of the November 10 order. The temporary order was filed on November 10, 2010, and the notice of appeal was filed on July 8, 2011. In order to vest an appellate court with jurisdiction, a notice of appeal must be filed within 30 days of the entry of the final order. *In re Interest of Jamyia M.*, 281 Neb. 964, 800 N.W.2d 259 (2011).

Moreover, if the November 10, 2010, order was not a final order, we are still without jurisdiction to review such order because the November 10 order would have been a temporary order, which has now been replaced by the permanent order filed on June 9, 2011. See *Coleman v. Kahler*, 17 Neb. App. 518, 766 N.W.2d 142 (2009) (issue of whether order denying Coleman's request for temporary custody was proper was relevant only from time it was entered until it was replaced by order determining children's permanent custody; accordingly, any issue relating to temporary order is moot and need not be resolved in this appeal). Therefore, regardless of whether the November 10, 2010, order was a final, appealable order or a temporary order, we do not have jurisdiction to review the November 10 order. Additionally, we feel compelled to emphasize that this was not a removal within the meaning of *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000), as the move was within Nebraska, something that does not require prior court approval. Rather, it was a temporary modification of the parenting schedule made necessary by Laura's move to Crofton. And while the move in these particular circumstances may appear disingenuous, Laura did seek court approval when the current State of Nebraska law does not require such action, although there may have been a need to have the court adjust parenting time.

2. DR. CAHILL

Scott assigns numerous errors with regard to the testimony and report of Dr. Cahill. In summary, Scott alleges that the district court erred in overruling his objections to Dr. Cahill on the theory, methodology, and application of his opinions.

Dr. Cahill is a clinical psychologist. He testified that he has conducted approximately 170 child custody evaluations over the past 22 years. Dr. Cahill conducted a child custody evaluation in this case, and as a result of his evaluation, he formed an opinion regarding custody of Tatum.

Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995), provides that “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” Pursuant to Neb. Rev. Stat. § 27-705 (Reissue 1995), “an expert’s opinion is ordinarily admissible if the witness (1) qualifies as an expert, (2) has an opinion that will assist the trier of fact, (3) states his or her opinion, and (4) is prepared to disclose the basis of that opinion on cross-examination.”

Heistand v. Heistand, 267 Neb. 300, 309-10, 673 N.W.2d 541, 549 (2004). At trial, Scott stipulated that Dr. Cahill is a competent expert in clinical psychology. And as stated above, as a result of his custody evaluation, Dr. Cahill formed an opinion regarding custody and ultimately recommended that Laura be granted sole custody of Tatum, but that Scott get frequent and liberal visitation with Tatum. In making his recommendation, Dr. Cahill relied on his interviews with Scott, Laura, and Tatum, as well as his psychological testing of Scott and Laura. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), require the trial court to act as a gatekeeper to ensure that expert testimony is scientifically valid and can be properly applied to the facts in issue, and therefore helpful to the trier of fact. *In re Interest of Christopher T.*, 281 Neb. 1008, 801 N.W.2d 243 (2011). In a bench trial, there is a presumption that the finder of fact disregards inadmissible evidence. *Id.* The trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert’s opinion. *Robb v. Robb*, 268 Neb. 694, 687 N.W.2d 195 (2004). This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology can be applied to the facts in issue. *Id.* In addition, the trial court must determine if the witness has applied the methodology in a reliable manner. *Id.* See, also, *State v. Fernando-Granados*, 268 Neb. 290, 682 N.W.2d 266 (2004) (under *Daubert* and *Schafersman*, expert evidence is admissible so long as foundation is presented to satisfy court of validity of theory or methodology underlying proffered opinion). A trial court adequately demonstrates that it has performed its gatekeeping duty in determining the reliability of expert testimony when the record shows (1) the court’s conclusion whether the expert’s opinion is admissible and (2) the reasoning the court used to reach that conclusion, specifically noting the factors bearing on reliability that the court relied on in reaching its determination. *Fickle v. State*, 273 Neb. 990, 735 N.W.2d 754 (2007).

A trial court may not abdicate its gatekeeping duty under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and

Schafersman v. Agland Coop, 262 Neb. 215, 631 N.W.2d 862 (2001), in a bench trial, but the court is afforded more flexibility in performing this function.

Fickle v. State, 273 Neb. at 1006, 735 N.W.2d at 770. “In determining whether an expert’s testimony is reliable, a trial court necessarily must first hear the testimony. And we presume that a trial court considers only competent and relevant evidence in rendering its decision.” *Id.* at 1007, 735 N.W.2d at 770.

Dr. Cahill testified that he followed the American Psychological Association’s guidelines in conducting the custody evaluation in this case and that the guidelines recommend at least 4 hours of interviews with each parent and child and the use of psychological testing for the adults. Dr. Cahill met with Laura and Scott individually 12 to 14 times each, for 1-hour sessions each time. Dr. Cahill also conducted psychological testing on the parties, including the Ackerman-Schoendorf Scales for Parent Evaluation of Custody Parent Questionnaire, Social History Supplement for Child Custody and Visitation Evaluation, Child Rearing Practices Report, Millon Clinical Multiaxial Inventory-III, and the Minnesota Multiphasic Personality Inventory-II. Additionally, Dr. Cahill met with Tatum. He also did parent-child observations.

Dr. Cahill explained that the Millon Multiaxial Clinical Inventory-III is a test of “general psychopathology” that also assesses character or personality disorders. He testified that the Minnesota Multiphasic Personality Inventory-II is also suggestive of character disorder and that it gives a more definitive analysis of character orientation. Dr. Cahill testified that in both tests, the individual answers hundreds of true/false questions, the response sheet is scored and a profile is developed, and the profile provides comparative indices against which the individual’s responses are compared--the individual’s statistical score is compared to an objective sample. Dr. Cahill testified that both the Millon Clinical Multiaxial Inventory-III and the Minnesota Multiphasic Personality Inventory-II are widely accepted by clinical psychologists and have been used for 26 to 28 years and 63 years, respectively. Dr. Cahill further testified that the Ackerman-Schoendorf Scales for Parent Evaluation of Custody Parent Questionnaire is widely accepted in the field of clinical psychology and has been used for 30 years, the Social History Supplement for Child Custody and Visitation Evaluation is widely accepted in the field of clinical psychology and has been used for 25 to 28 years, and the Child Rearing Practices Report is widely accepted in the field of clinical psychology and has been used for 50 years. Dr. Cahill also testified that the clinical interview and observations of the parent/child are standardized clinical psychology techniques that have been utilized for 25 to 30 years in custody evaluations.

In allowing Dr. Cahill’s testimony, the district court stated that foundation was sufficient for Dr. Cahill to give an opinion about Laura because Dr. Cahill listed all the tests he administered plus the observations he made and because Dr. Cahill stated he spent 12 to 14 hours with her. The district court stated that Dr. Cahill could give an opinion regarding Scott’s ability to parent because Dr. Cahill testified as to what methods he utilized to assess Scott and that those methods were sufficient to form an opinion. The district court also stated that Dr. Cahill testified that the psychological tests have been standardized and are utilized by professionals in his area. Based on our review of the record, we find that the district court fulfilled its gatekeeping duties to ensure that expert testimony is scientifically valid and could be properly applied to the facts in issue. When the trial court has not abdicated its gatekeeping function, an appellate court reviews the trial court’s decision to admit or exclude the evidence for an abuse of discretion. *Fickle v.*

State, 273 Neb. 990, 735 N.W.2d 754 (2007). We find no abuse of discretion in the district court's decision to admit the testimony of Dr. Cahill.

Scott argues that the district court erred in not allowing him to voir dire or cross-examine Dr. Cahill on the theory, methodology, and application of his opinions. It is true that Scott was not allowed to voir dire Dr. Cahill, but Scott was allowed to cross-examine Dr. Cahill. During cross-examination, Scott attempted to attack the reliability of psychology as a whole, but was only able to identify two diagnostic theories that have changed in the past 30 years--those being that (1) homosexuality is no longer considered a mental disorder and (2) African Americans are no longer considered more likely to be schizophrenic than "white members" of the population. Furthermore, the trial court stated that Scott was welcome to call witnesses to challenge Dr. Cahill's science, but Scott called no such witnesses. Scott was given ample opportunity to challenge Dr. Cahill on the theory, methodology, and application of his opinions, but failed to do so.

We have found that Dr. Cahill's expert testimony was properly admitted. However, Scott argues the district court erred when it overruled his objections that Dr. Cahill's opinions did not assist the trier of fact. The determination whether an expert's testimony or opinion will be helpful to a jury or assist the trier of fact in accordance with Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 2008), involves the discretion of a trial court, whose ruling on admissibility of an expert's testimony or opinion will be upheld on appeal unless the trial court abused its discretion. *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990). Under the standard of helpfulness required by Neb. Evid. R. 702, a court may exclude an expert's opinion which is nothing more than an expression of how the trier of fact should decide a case or what result should be reached on any issue to be resolved by the trier of fact. *State v. Reynolds*, *supra*.

Dr. Cahill testified that based on psychological testing and his observations, Laura is generally psychologically healthy and presents as a very effective and positive parenting figure. Dr. Cahill testified that Laura is a fit and proper person for sole custody. Dr. Cahill testified that based on psychological testing, Scott has a narcissistic character disorder. Dr. Cahill testified that the lack of empathy narcissists typically display is inconsistent with healthy parenting. Dr. Cahill also testified that Scott presents as manipulative and does not show a great deal of consideration for other people's needs or feelings. Dr. Cahill testified that Scott loves Tatum and is attached to her, but that his narcissism is incompatible with him being a good and effective parent because he cannot separate his needs and priorities from her needs. Dr. Cahill also testified that Scott cannot foster the relationship between Tatum and Laura. In its opinion, the district court stated that several examples of this behavior became apparent to the court. The district court noted that Scott was unwilling, until the last moment, to make any accommodation of the visitation schedule to allow Tatum to participate in Laura's wedding. The district court also noted that Scott's own testimony demonstrated the level to which his current household's schedule is focused around his own activities.

In his report, which was received into evidence, Dr. Cahill stated that Tatum is strongly attached to each of her parents. Dr. Cahill testified that it would be in Tatum's best interests to be in Laura's sole custody. In his report, Dr. Cahill stated that there should be frequent, liberal, and regular parenting time between Tatum and Scott. The district court found that the totality of the evidence does not demonstrate that Scott is an unfit parent. But the facts do demonstrate that

Laura has been a stable and constant presence in Tatum's life, having been her primary caregiver and making virtually all of the major parenting decisions necessary for Tatum. While the district court may have considered Dr. Cahill's recommendations, it is clear that the district court based its decision on the totality of the evidence, including its own observations. The district court did not abuse its discretion in allowing Dr. Cahill's opinions regarding custody even though Scott claimed that such did not meet the "helpfulness standard" for the admission of expert opinion. Clearly, Dr. Cahill undertook a professional, educated, and comprehensive analysis of the parental custody matter, and his opinion is clearly admissible, including his recommendation regarding custody.

Scott argues that the district court erred in overruling his objections that Dr. Cahill's report, the ABA study, and Tatum's statements were inadmissible hearsay. Dr. Cahill testified that producing a report is customary in completing a custody evaluation. The evaluation report was received over Scott's hearsay objection. In its opinion, the district court relies on Dr. Cahill's testimony and its own observations from the court proceedings. The district court mentions only Dr. Cahill's report when it states that such report demonstrates that Tatum loves both of her parents and desires significant time with each--statements in Scott's favor. Thus, even if the report was improperly received, it basically reiterates and duplicates Dr. Cahill's testimony at trial. Thus, its admission could not be prejudicial and this claim of error is without merit.

In his testimony, Dr. Cahill mentioned an ABA study that indicated that the creation of a hostile environment between parents is the best predictor for negative outcomes for children. This testimony was objected to, and now error is assigned to the overruling of the objection. The study was not admitted into evidence, but Dr. Cahill cited to it when testifying about Scott's ability to foster a good relationship with Laura and said that such study, conducted every 2 years by the ABA in conjunction with the American Psychological Association, reveals that hostilities between parents negatively affect children. Thus, the record shows that the study is relied upon by psychologists and is authoritative. Moreover, Dr. Cahill could properly testify about parental hostility adversely affecting children, given his experience and qualifications, with or without the ABA study. Thus, there was no error in admitting testimony about the ABA study during Dr. Cahill's testimony.

Dr. Cahill testified that during his interview with Tatum, Tatum told him that she wanted to split her time "fifty-fifty" between her parents. Dr. Cahill testified that small children rarely talk in terms of "fifty-fifty," so he asked Tatum who told her to tell him that and Tatum said Scott told her to say that. The district court considered this testimony in its removal analysis regarding the child's preference, but did not find that such weighed in favor of or against removal. And, it does not appear that it was offered to prove the truth of the matter asserted. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. See Neb. Evid. R. 801(3), Neb. Rev. Stat. § 27-801(3) (Reissue 2008). Rather, it was part of an expert's analysis of the family dynamic and thus not objectionable as hearsay. This claim of error is without merit.

3. CUSTODY

Ordinarily, custody of a minor child will not be modified unless there has been a material change in circumstances showing that the custodial parent is unfit or that the best interests of the child require such action. *Tremain v. Tremain*, 264 Neb. 328, 646 N.W.2d 661 (2002). The party seeking modification of child custody bears the burden of showing a change in circumstances. *Id.* A material change in circumstances means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently. *Id.*

Laura does not allege that Scott is an unfit parent. Therefore, the focus is on whether there has been a material change in circumstances. The decree of paternity was entered when both parties lived in Omaha. Since the decree of paternity, Laura has married Adam, who lives and works in Yankton. Laura seeks permission to remove Tatum to South Dakota. In the meantime, however, Laura and Tatum have moved to Crofton. The parties now live 2½ hours apart, a factor which complicates the joint custody arrangement and was not contemplated at the time the court entered the decree of paternity in September 2009. Furthermore, Laura and Scott can no longer communicate effectively. Laura and Scott now only communicate through e-mail. The parties cannot agree on what weekends Tatum should visit Scott in Omaha. Scott accuses Laura of interfering with his contact with Tatum when Tatum is with Laura. Thus, there has clearly been a material change in circumstances that was not anticipated when the court entered the decree of paternity and set the parameters for parenting time. We have said that when parents are unable or unwilling to execute parenting duties jointly, the result is that one or the other must be given primary responsibility for the child's care. See *Coffey v. Coffey*, 11 Neb. App. 788, 661 N.W.2d 327 (2003). This is quite clearly such a case.

Both Laura and Scott now seek sole custody of Tatum. In determining which parent should be awarded custody, the district court is to consider the child's best interests. The best interests of the child require a parenting arrangement which provides for a child's safety, emotional growth, health, stability, and physical care and regular and continuous school attendance and progress. Neb. Rev. Stat. § 43-2923(1) (Cum. Supp. 2010). The district court shall also consider:

- (a) The relationship of the minor child to each parent prior to the commencement of the action or any subsequent hearing;
 - (b) The desires and wishes of the minor child, if of an age of comprehension but regardless of chronological age, when such desires and wishes are based on sound reasoning;
 - (c) The general health, welfare, and social behavior of the minor child;
 - (d) Credible evidence of abuse inflicted on any family or household member. . . ;
- and
- (e) Credible evidence of child abuse or neglect or domestic intimate partner abuse.

§ 43-2923(6).

In the instant case, Tatum was only 6 years old at the time of trial and, thus, too young for her wishes to carry any weight. The evidence at trial was that Tatum has lived with Laura for her

entire life. Scott lived with Tatum off-and-on through the fall of 2007, when the parties separated for good. Laura has always been the one to make decisions regarding Tatum's education and health care, although Scott started to voice his opinion more strongly after Laura filed to remove Tatum to South Dakota. Laura testified that if granted custody, she would ensure that Tatum maintained a relationship with Scott. Scott, on the other hand, tends to focus on his own needs with little consideration for others. For example, the evidence at trial was that Scott was unwilling, until the last minute, to make any accommodation of the visitation schedule to allow Tatum to participate in Laura's October 2010 wedding. Scott also insists on getting every minute of his twice weekly Webcam communications with Tatum, even when Tatum loses interest and asks to be done early. After our de novo review of the record, we cannot say that the district court abused its discretion in awarding sole custody of Tatum to Laura. The remaining question is whether Laura should be allowed to remove Tatum to South Dakota.

4. REMOVAL FROM STATE

The Nebraska Supreme Court in *Farnsworth v. Farnsworth*, 257 Neb. 242, 249, 597 N.W.2d 592, 598 (1999), stated:

To prevail on a motion to remove a minor child, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state. . . . After clearing that threshold, the custodial parent must next demonstrate that it is in the child's best interests to continue living with him or her. . . . Of course, whether a proposed move is in the best interests of the child is the paramount consideration.

(a) Legitimate Reason to Leave State

Laura wanted to move to South Dakota because (1) she married a man who lives and works in Yankton and (2) she had received an employment opportunity in Gayville-Volin, near Yankton. Laura married Adam on October 2, 2010. Adam is a civil engineer for the city of Yankton and is a member of the Yankton Volunteer Fire Department. He owns a home in Yankton and is required to live within 5 miles of the fire station in order to remain a firefighter with the Yankton Volunteer Fire Department. Laura has a bachelor's degree in elementary education, a master's degree in curriculum and instruction, and a master's degree in educational administration. Laura obtained employment as a reading teacher at the Gayville-Volin School District. She started the position at the beginning of the 2010-11 school year, commuting daily from Omaha until she moved to Crofton in November 2010. Laura was previously a teacher with the Papillion-La Vista School District and taught English as a second language. She testified that she has more curriculum and administrative opportunities at the school district in South Dakota because it is a smaller district than the Papillion-La Vista School District.

The Nebraska Supreme Court has said that "a move to reside with a custodial parent's new spouse who is employed and resides in another state may constitute a legitimate reason for removal." *Vogel v. Vogel*, 262 Neb. 1030, 1042, 637 N.W.2d 611, 622 (2002). Furthermore, "[a] reasonable expectation of improvement in the career or occupation of the custodial parent is a legitimate reason to relocate." *Gartner v. Hume*, 12 Neb. App. 741, 754, 686 N.W.2d 58, 72 (2004). After our de novo review, we agree with the trial court that Laura has established a legitimate reason for removal to South Dakota. We now turn to the child's best interests.

(b) Child's Best Interests

In determining whether removal to another jurisdiction is in the child's best interests, the trial court considers (1) each parent's motives for seeking or opposing the move; (2) the potential that the move holds for enhancing the quality of life for the child and the custodial parent; and (3) the impact such a move will have on contact between the child and the noncustodial parent, when viewed in the light of reasonable visitation. *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002). See, also, *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999) (where definitive roadmap for analysis of such cases first set forth).

(i) Each Parent's Motives

The record is convincing that both parents are acting in good faith. Laura wants to move to South Dakota to live with her new husband and to further her career in education. Furthermore, Laura's parents, siblings, and extended family live in South Dakota. Scott does not want Laura to move Tatum to South Dakota because the move would affect the parenting time that he has with Tatum. This factor is essentially neutral.

(ii) Quality of Life

The *Farnsworth* court set forth a number of factors to assist trial courts in assessing whether the proposed move will enhance the quality of life for the child and the custodial parent. Factors to be considered include (1) the emotional, physical, and developmental needs of the child; (2) the child's opinion or preference as to where to live; (3) the extent to which the custodial parent's income or employment will be enhanced; (4) the degree to which housing or living conditions would be improved; (5) the existence of educational advantages; (6) the quality of the relationship between the child and each parent; (7) the strength of the child's ties to the present community and extended family there; (8) the likelihood that allowing or denying the move would antagonize hostilities between the two parents; and (9) the living conditions and employment opportunities for the custodial parent because the best interests of the child are interwoven with the well-being of the custodial parent. See *Farnsworth v. Farnsworth*, *supra*.

a. Emotional, Physical, and Developmental Needs

In the instant case, there is no evidence that the emotional, physical, and developmental needs of Tatum cannot be met in either Nebraska or South Dakota. This factor does not militate one way or another.

b. Child's Preference

The child's preference is a nonfactor in the instant case as she did not testify at trial because of her young age.

c. Enhancement of Income and Employment

Laura testified that her job in South Dakota pays \$5,000 per year less than her job with the Papillion-La Vista School District. However, Laura testified that the cost of living in South Dakota is less than in Omaha. She further testified that she has more curriculum and

administrative opportunities at the school district in South Dakota because it is a smaller district than the Papillion-La Vista School District. Furthermore, in South Dakota, Laura has a husband with an established career who makes a good living and contributes to the household income. Therefore, income and career opportunities for Laura weigh in favor of the move.

d. Housing and Living Conditions

Since November 2010, Laura and Tatum have been living in a two-bedroom apartment in Crofton. In Yankton, Adam owns a two-bedroom, two-bathroom home. In Yankton, Tatum would have her own room. Adam has restrictions on where he can live because of his position with the Yankton Volunteer Fire Department. Therefore, he cannot live in Crofton. If Laura is not allowed to move to South Dakota, she and Adam would be required to maintain two residences, as they do now. Obviously, this means they incur extra expenses every month. Clearly, allowing Laura to reside with her husband in Yankton would reduce their monthly expenses and increase their disposable income.

In Omaha, Scott lives with his girlfriend and her daughter. Scott's girlfriend owns the home, and Scott contributes to the utilities. At Scott's girlfriend's house, Tatum shares a room with her half sister. And although Scott and his girlfriend testified that their relationship is permanent, they are not married, nor do they have any plans to marry. Scott acknowledged that his girlfriend could ask him to move out on a moment's notice. Thus, housing and living conditions favor the move.

e. Educational Advantages

Tatum was almost 7 years old at the time of trial. At the time of trial, Tatum was attending school in Yankton. She had previously attended school in Omaha. Laura testified that as a teacher, she believes that the smaller student-to-teacher ratio in Yankton is an educational advantage for Tatum. Laura also testified that Tatum is progressing faster at the school in Yankton compared to her prior school. On cross-examination, Laura acknowledged that there could be multiple variables for Tatum's progress and that the new school is not necessarily the reason. This consideration weighs only slightly in favor of removal.

f. Quality of Relationship Between Children and Parents

Tatum appears to have a quality relationship with both Laura and Scott. This factor does not prevent or favor the move.

g. Ties to Community and Extended Family

Laura has no relatives in Nebraska. However, Laura, and by extension Tatum, has a large extended family in South Dakota, including Laura's mother and stepfather, father, brother, sister, nieces and nephews, grandfather, aunts and uncles, and in-laws. Scott has no family living in Nebraska. His older daughter lives in Council Bluffs. Scott has numerous relatives in South Dakota, including his father, his sister and her family, his grandmother, and his aunt. Scott visits his family and friends in South Dakota every 1½ months. This factor weighs in favor of removal.

h. Hostilities Among Parents

The potential for antagonizing hostilities between the parents exists whether the move is allowed or denied. And the parties' relationship has already deteriorated since Laura's move to Crofton. Laura testified that coordinating schedules has been difficult as Scott fails to give adequate notice regarding whether he will pick Tatum up in South Dakota or whether the parties should meet halfway for an exchange. Laura testified that Scott has been unwilling to adjust the Friday exchange time even though Tatum does not get home from school in time to make it for the exchange time. There has also been confusion as to the weekend parenting schedule, since the temporary schedule was set through only January 3, 2011. Scott testified that the move to Crofton has made his relationship with Laura worse. Scott also testified that Yankton is 5 to 10 miles from Crofton and that a move to Yankton from Crofton would not affect his relationship with Tatum any more than it has already been affected. Laura testified that she thinks some of the conflict will be resolved after the custody/removal is settled because there will be no more uncertainty. Our hope is that Scott and Laura will understand that their conflicts are not good for Tatum and that they will be able to better work together to promote her best interests. This factor does not prevent or favor the move.

(iii) Impact on Noncustodial Parent's Visitation

"[T]his consideration focuses on the ability of the noncustodial parent to maintain a meaningful parent-child relationship." *Farnsworth v. Farnsworth*, 257 Neb. 242, 251, 597 N.W.2d 592, 599 (1999). And "[w]hen looking at this consideration, courts typically view it in the light of the potential to establish and maintain a reasonable visitation schedule." *Id.* The *Farnsworth* court noted that the frequency and the total number of days of visitation and the distance traveled and expense incurred go into the calculus of determining reasonableness, citing *In re Marriage of Herkert*, 245 Ill. App. 3d 1068, 615 N.E.2d 833, 186 Ill. Dec. 29 (1993). In *Farnsworth*, the court noted that while a move from Omaha to Denver, Colorado, would necessarily lessen the frequency of the noncustodial parent's visits with the child, the distance between the two cities was not such as would prevent the noncustodial parent from seeing his child on a regular basis.

It seems inherent in any removal case that the noncustodial parent's visitation will be negatively affected by such things as lengthy car trips, the need for air travel, reduced frequency of visits, and increased expense associated with visitation, and perhaps all of such things. However, we suggest that because these inherent adverse effects on visitation are likely present in any removal case, the *Farnsworth* opinion emphasizes whether a reasonable visitation schedule can be established and maintained. Thus, the question moves away from simply whether there is an adverse impact on visitation by removal, and becomes more nuanced--whether frequency, total days, distance, and expense after removal prevent a reasonable visitation schedule.

Scott's parenting time will not be much different if Tatum lives in Yankton, as opposed to Crofton, where she presently lives. The district court awarded Scott parenting time two weekends per month during the school year, every other week during the summer, specified holidays, and certain days that Tatum was not in school. In addition, Scott was awarded two 30-minute Webcam communications with Tatum per week and one telephone contact on days in

which the Webcam conversations do not take place. The court's order allows Scott to maintain reasonable visitation with Tatum. Therefore, viewing this factor in that light, we must conclude that it does not prevent the removal of Tatum to South Dakota.

(c) Summary

As said earlier, the evidence clearly establishes a legitimate reason for the move to South Dakota. We find that the motives of Laura for wanting to move, and those of Scott in opposing the move, are based in good faith. As for the best interests of Tatum, we find that as to her emotional, physical, and developmental needs, this factor was neutral. Tatum's preference is also a nonfactor. Income and career opportunities for Laura weigh in favor of the move. Housing and living conditions weigh in favor of the move. Educational advantages for Tatum weigh slightly in favor of removal. The quality of the relationship between Tatum and her parents appeared to be good and was not a factor upon which the decision would rest. The presence of Laura's and Scott's extended family in South Dakota is a factor which weighs in favor of the move. Whether the move would generate hostilities between parents is a factor upon which the decision cannot be based. Scott's visitation rights will be affected no more than if Tatum continued to live in Crofton. And when analyzed from the standpoint of whether arrangements can be made to maintain a reasonable visitation schedule, we find that this factor does not prevent the move. In conclusion, we find that the district court had the opportunity to observe the witnesses at trial and did not abuse its discretion in allowing Laura to remove Tatum to South Dakota.

VI. CONCLUSION

For the reasons stated above, we find that there was a material change in circumstances justifying a change of custody and that the district court did not abuse its discretion in awarding custody of Tatum to Laura. Furthermore, Laura had a legitimate reason for wanting to move to South Dakota and the move is in Tatum's best interests. Therefore, we affirm the decision of the district court in all respects.

AFFIRMED.